

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

immediately. Respondent's first aid room personnel applied a cast and transported claimant to the hospital.

Claimant came under the treatment of Dr. Guillermo Garcia and was treated conservatively from March until October 16, 1998. Respondent does not contest the compensability of the right wrist.

Claimant was returned to work at respondent with a limitation that he not use his right hand. He began using his left hand, breaking cardboard and packing it in crates. He also had to run a floor scrubber, water the yards, unload truckloads of steel, including iron bars, and stack tubing or rods. Claimant alleges that during this time his left hand became symptomatic.

In reviewing the medical records, there is no mention of a left hand work-related injury at any time while claimant was being treated by Dr. Garcia. There was one mention of the left wrist on September 15, 1998, when Dr. Garcia noted claimant had a limited range of motion in the left wrist, although this was noted as being mild.

Claimant did allege that he advised his supervisor, John Castenada, the respondent's environmental technician, and Raymond Law, respondent's environmental health and safety coordinator, of his left wrist problems. Both Mr. Castenada and Mr. Law testified and both denied being advised of any left wrist problems while claimant was employed with respondent.

Claimant continued working for respondent in a light duty capacity until October 15, 1998. At that time, it was concluded that claimant's right wrist was worsening and the appropriate treatment would be surgery. Claimant underwent surgery through Dr. Garcia, but the surgical results were less than satisfactory. Claimant was then referred by Dr. Garcia to Dr. J. Mark Melhorn, a hand specialist in Wichita, Kansas.

Dr. Melhorn first saw claimant on January 22, 1999. At that time, claimant's complaints remained in the right hand, although in testing claimant bilaterally, Dr. Melhorn did note claimant had a positive percussion, positive Phalen's and positive direct test in the left wrist.

However, there was no mention in Dr. Melhorn's January 22, 1999, report of a work-related connection to claimant's left wrist problems.

When Dr. Melhorn saw claimant on February 1, 1999, claimant did indicate increased symptoms with regard to the left hand and wrist, and Dr. Melhorn indicated he would add the diagnosis of painful left hand/wrist. Claimant advised Dr. Melhorn that he had told Dr. Garcia about prior left wrist problems, but they had become more noticeable

at this time. Dr. Melhorn noted that claimant discussed an onset sometime in December or January.

By the March 9 and March 19, 1999, examinations, claimant was advising Dr. Melhorn that he believed the left wrist problems were associated with his work with respondent. He indicated that he had overcompensated when restricted in his right wrist and this was causing the left wrist problems. In March of 1999, claimant filed an incident report with respondent, indicating his left wrist symptoms were related to his employment with respondent through October 15, 1998. Both Mr. Castenada and Mr. Law denied being advised of a work-related injury to claimant's left wrist prior to this report. Mr. Castenada maintained a notebook in which he wrote entries regarding his daily contact with employees. He had no entry in that notebook regarding claimant's left wrist problems before March 1999.

Along with his bilateral hand problems, claimant has also been diagnosed with diabetes which, according to the medical reports, contributes to the peripheral neuropathy in his upper extremities.

In proceedings under the Workers Compensation Act, the burden of proof is on claimant to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. See K.S.A. 1996 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g).

The record, in this instance, is contradictory, with claimant's testimony being directly contradicted by the testimony of Mr. Castenada and Mr. Law, respondent's representatives. The medical evidence, likewise, is contradictory with regard to whether claimant suffered accidental injury arising out of and in the course of his employment to his left hand and whether he provided notice to respondent of that accident. There is mention in Dr. Garcia's notes, although only briefly, of the left wrist. The allegations regarding a work-related connection to the left wrist problems did not surface until claimant's treatment with Dr. Melhorn in March of 1999, a full year after claimant's sudden onset injury to his right wrist. The ultimate decision here rests on whom do you believe. In this instance, the Administrative Law Judge observed claimant, Mr. Castenada and Mr. Law testify. The Appeals Board is unable, from reviewing the transcripts, to ascertain as accurately the credibility of the witnesses. The Appeals Board has in the past given some deference to the administrative law judge's conclusions because he or she had the opportunity to assess the credibility of witnesses during live testimony. The Administrative Law Judge, in assessing the testimony in this matter, apparently found claimant to be the more credible witness in this instance as she did award benefits for the left upper extremity.

For preliminary hearing purposes, the Appeals Board will accept the assessment of the Administrative Law Judge regarding the credibility of the witnesses and finds that claimant has proven, although by the narrowest of margins, that he suffered accidental

injury arising out of and in the course of his employment and provided timely notice of injury to his left upper extremity. Therefore, the granting of benefits for preliminary hearing purposes should be affirmed.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Pamela J. Fuller dated June 21, 1999, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August 1999.

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BOARD MEMBER

c: M. John Carpenter, Great Bend, KS  
Anton C. Andersen, Kansas City, KS  
Pamela J. Fuller, Administrative Law Judge  
Philip S. Harness, Director